

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT E. MCNEMEE

Claimant

VS.

HYPLAINS DRESSED BEEF, INC.

Respondent

AND

HOME INSURANCE COMPANY

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 155,767

ORDER

ON the 8th day of February, 1994, the application of the respondent and insurance carrier for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Thomas F. Richardson, dated December 21, 1993, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney Donald E. Shultz of Dodge City, Kansas. Respondent and insurance carrier appeared by their attorney John D. Jurcyk of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney Kendall R. Cunningham of Wichita, Kansas. There were no other appearances.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

ISSUES

The Administrative Law Judge found claimant entitled to permanent partial disability benefits based upon an impairment of function rating of eighty-five percent (85%) and held the Kansas Workers Compensation Fund liable for twelve percent (12%) of the award. The respondent and insurance carrier have requested review of the Administrative Law Judge's decision and contend the evidence presented fails to establish that claimant is entitled to permanent partial disability benefits and that the Kansas Workers Compensation Fund should be liable for one hundred percent (100%) of any award made in this proceeding.

The issues before the Appeals Board on this review are:

- (1) Nature and extent of disability;
- (2) Liability of the Kansas Workers Compensation Fund;
- (3) Applicability of the credit under K.S.A. 44-510a; and
- (4) Average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The claimant is entitled permanent partial disability benefits based upon the eighty-five percent (85%) permanent impairment of function rating provided by claimant's treating physician, board certified neurosurgeon Burton M. Onofrio, M.D., of the Mayo Clinic.

The claimant, a 41-year old male, worked for the respondent in a beef packing plant. Claimant's job at the time of his injury on December 6, 1990 was as a lead man in the cooler in charge of loading trucks. At the time of his injury, claimant was attempting to push two carcasses when he felt excruciating pain from the middle of his back down through his legs. After seeing a local chiropractor and a physician, claimant was referred to board certified neurosurgeon Paul S. Stein, M.D., of Wichita, Kansas.

Dr. Stein first saw claimant on January 10, 1991. Dr. Stein reviewed an MRI taken in December 1990 that revealed disc protrusion and spinal canal narrowing at the T12-L1 intervertebral level and questioned whether claimant might have spondylolysis at the fifth lumbar area. Dr. Stein recommended a myelogram, a post-myelogram CT scan, and a tomogram which were performed and indicated disc protrusion at the T11-12 intervertebral level, substantial pressure on the spinal cord in the lower thoracic region, and spondylolisthesis in the lumbar spine. Due to the severity of the problem, Dr. Stein felt claimant needed the services of a major neurological medical center and referred him to Dr. Onofrio at the Mayo Clinic in Rochester, Minnesota.

Claimant came under treatment of the Mayo Clinic on February 21, 1991. Dr. Onofrio essentially agreed with the results of the previous diagnostic tests and felt claimant had a herniated disc at the T11-12 level and spondylolysis at the L5-S1 level. Before undertaking the complicated and risky surgery that the doctor felt was needed, Dr. Onofrio sent claimant home to lose weight and quit smoking and drinking. Claimant returned to the Mayo Clinic in January 1992 for follow-up. A myelogram and CT scan were performed in January 1992 which confirmed the problems in claimant's thoracic spine. When Dr. Onofrio saw claimant in January 1992, claimant was quickly becoming a complete paraplegic and suffering from loss of bladder control, bowel control, sexual dysfunction, and nearly a complete loss of use of his lower legs. Dr. Onofrio performed surgery on January 14, 1992 in which he performed a total laminectomy at T2-T3; a left partial hemilaminectomy and discectomy and the removal of ligament at T12-L1; and right partial hemilaminectomy and facetectomy with dural decompression and removal of ligament at T11-T12. Claimant was followed post-operatively by the Mayo Clinic through February 1993. Regarding permanent restrictions, Dr. Onofrio believes that claimant should not lift more than 20 pounds, should not walk on slippery surfaces and should only walk on even surfaces. Dr. Onofrio believes that claimant has suffered an eighty-five percent (85%)

permanent partial loss of function to the body as a whole as a result of his work related accident and resulting condition. Dr. Onofrio testified that surgery was performed to stop the progression of symptomatology rather than to regain the physiological loss claimant had experienced.

The claimant was examined by Guillermo Garcia, M.D., an orthopedic surgeon, on February 14, 1991. Dr. Garcia is in a unique position as he is the only physician who testified that had an opportunity to see and treat the claimant prior to his December 1990 work related accident. Based upon the physical examination, diagnostic films, and history, Dr. Garcia diagnosed that claimant had a herniated disc at the T12 level and spondylolysis of L5-S1.

Following his release from Dr. Onofrio, claimant was awarded Social Security Disability benefits, and has not returned to employment. Claimant does not seek benefits based upon work disability and has presented no evidence with regard to same.

Respondent and insurance carrier argue that the claimant suffered no additional impairment of function as a result of the work related accident that occurred on December 6, 1990. The record is clear that although claimant had back problems before December 6, 1990, he was performing his job duties with the respondent without significant difficulty. Prior to December 1990, claimant admitted that he had back pain and occasional weakness in his legs. However, both Drs. Garcia and Onofrio believe that the work related incident in December 1990 permanently increased claimant's neurological dysfunction. Dr. Onofrio testified that the condition for which he operated were degenerative changes and bone spurs with a superimposed herniated thoracic disc. Based upon the problems claimant was experiencing when he first came to the Mayo Clinic, Dr. Onofrio believed that claimant had recently experienced some new phenomena that had caused increased neurologic deficit, and that claimant could not have had a significant herniation of the T12 level and continued to do the strenuous physical work that he was performing on December 6, 1990.

The respondent and insurance carrier and the Kansas Workers Compensation Fund questioned Dr. Onofrio's use of the second edition of the Guides to the Evaluation of Permanent Impairment published by the American Medical Association. Whether or not Dr. Onofrio was totally accurate in using the guides or its conversion tables, the Appeals Board finds that Dr. Onofrio's opinion should be accepted in this instance. Claimant was almost rendered paraplegic as a result of his December 1990 accident. Dr. Onofrio testified that the surgery was performed to prevent claimant from becoming completely paraplegic and that the surgery was intended to retain rather than restore claimant's condition. No other physician who testified rated the claimant following his December 1990 injury and related surgery. The Appeals Board finds Dr. Onofrio's credentials to be quite impressive. The claimant's symptoms, complaints, and combined residual effects of his accidental injury indicate that the claimant's functional impairment rating of eighty-five percent (85%) is not so unreasonable that it should be disregarded. However, as indicated above, Dr. Onofrio was the only medical expert to testify regarding claimant's permanent impairment of function rating after the December 1990 accident, and uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978); Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976); Berry v. Wondra, 173 Kan. 273, 246 P.2d 282 (1952).

(2) The Kansas Workers Compensation Fund is absolved of liability for this award.

It is well documented that the claimant suffered a back injury on October 15, 1985, which was compensable under the Kansas Workers Compensation Act. As a result, the claimant received a ten percent (10%) permanent partial general disability award based upon an impairment rating provided from Dr. Garcia in January 1988. Claimant returned to work for the respondent and resumed his regular job duties. A Form 88, Notice of Handicapped Employee, was filed with the Division of Workers Compensation. Respondent had the requisite knowledge of the claimant's preexisting impairment.

It is the burden of the respondent and insurance carrier to show that it is more probably true than not that the conditions exist which would relieve them of liability under K.S.A. 44-567.

Dr. Onofrio's testimony is not helpful regarding the issues pertaining to Fund liability. Dr. Onofrio could not provide an opinion regarding contribution, nor could he say that claimant's injury or disability would not have occurred but for the preexisting impairment. As indicated above, Dr. Onofrio testified that the conditions for which he operated on claimant were degenerative changes and bone spurs with a superimposed herniated thoracic disc. Dr. Onofrio described the disc herniation as possibly the straw that broke the camel's back. Dr. Onofrio believes that a series of events have contributed to claimant's ultimate disability, but he is unable to apportion those events.

Dr. Stein's testimony is likewise not helpful regarding the issues of Fund liability. Contrary to the opinion of Dr. Onofrio, Dr. Stein was unable to state with any degree of certainty that there was any permanent injury or aggravation caused by the injury of December 1990. Also contrary to Dr. Onofrio, Dr. Stein believes that claimant had a herniated disc at T11-T12 prior to December 1990, but is unable to say whether the incident at work in December 1990 affected the disc in any way.

The only physician to render an opinion with regard to Fund liability with any degree of certainty was Dr. Garcia. However, Dr. Garcia's deposition was taken with the stipulation that it could not be used against the Fund without the Fund's subsequent consent by stipulation. The file does not reflect that the Fund's stipulation was ever obtained; therefore, Dr. Garcia's testimony cannot be used regarding the issues of Fund liability.

Based upon the above, the evidence fails to establish that the Kansas Workers Compensation Fund is liable for any portion of this award pursuant to K.S.A. 44-567. The Appeals Board is aware that the Administrative Law Judge compared claimant's ten percent (10%) impairment of function rating given to him by Dr. Garcia in January 1988 to his ultimate impairment of function rating of eighty-five percent (85%) provided by Dr. Onofrio, and found that the Kansas Workers Compensation Fund should be liable for twelve percent (12%) of the total award. The Appeals Board is unable to adopt that analysis as the ten percent (10%) rating from Dr. Garcia appears to include complaints with respect to the lower back, whereas Dr. Onofrio did not incorporate the low back condition into his eighty-five percent (85%) rating. Without resorting to pure speculation, the Appeals Board is unable to find a percentage of contribution that the preexisting physical impairment has contributed to claimant's ultimate disability.

(3) The respondent and insurance carrier are not entitled to a credit pursuant to K.S.A. 44-510a. For the reasons expressed above, the evidence fails to establish the percentage of contribution claimant's prior disability contributes to his ultimate disability after the December 1990 accident. Without knowing the extent of contribution, the Appeals Board is unable to order a reduction in compensation for the period that permanent partial disability benefits would otherwise overlap.

(4) Claimant's average weekly wage is \$405.13. The Appeals Board adopts the method and manner the Administrative Law Judge determined averaged weekly wage as set forth in his award.

The issue pertaining to average weekly wage was not argued before the Appeals Board, nor was it identified as an issue that the Appeals Board is requested to address. However, as the issue has been mentioned in documents filed subsequent to oral argument, the Appeals Board has made this specific finding regarding same.

The Administrative Law Judge has utilized the wage statement that was entered

into evidence. The respondent and insurance carrier contend that certain information showing amounts paid on the wage statement are not to be considered as such payments have not been specifically identified. The Appeals Board finds that the Administrative Law Judge properly considered the information on the wage statement and that respondent in this instance had the burden of going forward with evidence should information on the document be erroneous or for some other reason be disregarded.

(5) The Appeals Board incorporates by reference as if fully set forth herein all the findings of fact and conclusions of law of the Administrative Law Judge as set forth in his Award of December 21, 1993, that are not inconsistent with those findings and conclusions specifically set forth herein above.

AWARD

WHEREFORE, an award of compensation, in accordance with the above findings, is entered in favor of the claimant, Robert E. McNemee, and against the respondent, Hyplains Dressed Beef, Inc., and its insurance carrier, Home Insurance Company, for an accidental injury occurring on December 6, 1990.

The claimant is entitled to 33 weeks temporary total disability at the rate of \$270.10 per week or \$8,913.30 followed by 382 weeks of permanent partial compensation at the rate of \$229.59 per week or \$87,703.38 for a eighty-five percent (85%) permanent partial general body disability making a total award of \$96,616.68

As of March 2, 1994, there would be due and owing to the claimant 33 weeks temporary total compensation at \$270.10 per week in the sum \$8,913.30 plus 136 weeks permanent partial compensation at the rate of \$229.59 per week in the sum of \$31,224.24, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$56,479.14 shall be paid at \$229.59 per week for 246 weeks or until further order of the Director.

The Kansas Workers Compensation Fund is absolved of all liability for this award.

The Appeals Board adopts and incorporates by reference as if fully set forth herein all additional orders of Administrative Law Judge Thomas F. Richardson as set forth in his Award dated December 21, 1993, that are not inconsistent with those orders specifically made above.

IT IS SO ORDERED.

Dated this ____ day of April, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Donald E. Shultz, P.O. Box 1433, Dodge City, Kansas 67801-1433
John D. Jurcyk, P.O. Box 14548, Lenexa, Kansas 66285-4548
Kendall R. Cunningham, 125 North Market, Suite 1416, Wichita, Kansas 67202
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director